No. 80-442

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In the Supreme Court of the United States

OCTOBER TERM, 1980

BEN F. GARMAN,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY,

Respondent.

REPLY MEMORANDUM

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TABLE OF CONTENTS

	PAGE
Preface	1
Reply	2-8
Conclusion	9
Appendix	
Judge James' minute order	App. 1
Portion of Transcript of Proceedings in Bankruptcy Court on March 29, 1977	App. 2
Portion of Transcript of Proceedings in Bankruptcy Court on March 28, 1977	App. 3

TABLE OF AUTHORITIES

Cases

PAGE

Engstrom v. Wiley, 191 F.2d 684 (9th Cir. 1951) 6

Haynes v. United States, 390 U.S. 85 (1968) 8

Kostelac v. United States, 247 F.2d 723 (9th Cir. 1957) 5

Kosty v. Lewis, 319 F.2d 744 (D.C. Cir. 1963) 8

Magna Sales Co. v. Magna Alloys Research Pty., 545 F.2d 668 (9th Cir. 1977) 5

Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) 6

In re Rockford Baseball Club, 201 F.2d 685 (7th Cir. 1953) 7

Singleton v. Wulff, 428 U.S. 121 (1976) 7

Smith v. Dravo Corp., 208 F.2d 388 (7th Cir. 1953) 5

Yunker v. CIR, 256 F.2d 130 (6th Cir. 1958) 5

Constitution, Statutes and Rules

Bankruptcy Act, 11 U.S.C. §35 U.S.C. §35(a)(2) 3, 4

28 U.S.C §2106 4

Rule 41(b), Federal Rules of Civil Procedure 1, 2, 3, 4, 8

Rule 52(a), Federal Rules of Civil Procedure 4, 7

Other Authorities

5 J. Moore, Federal Practice §41.13[2] at 41-185 (2d ed. 1980) 4

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Preface

The response to the Petition for a Writ of Certiorari was astutely drafted using a devious design of distraction from the real issues and derangement of the facts in the hope of so muddling this appeal as to create some grand delusion. While speaking out against "jaundiced partnership," the respondent seeks to influence this Court with its diatribe of remarks of "criminality," "student of semantics," and other unfounded innuendoes about the petitioner.

Rather than addressing itself to Rule 41(b) of the Federal Rules of Civil Procedure, and the due process issues, the respondent merely glosses over these matters, relegating its response to petitioner's cases to footnotes, and

spends the majority of its brief with its own biased version of the facts.

At no place in its brief does the respondent support its underlying premise with case law or otherwise, that the limited testimony of a defendant as an adverse witness somehow satisfies the requirements of Rule 41(b) of the Federal Rules of Civil Procedure. While desiring to avoid the pitfalls of the expertly laid snare of diversion, the petitioner must respond to the respondent's brief.

A.

The respondent, Northern Trust Company, in its response to the Petition for Writ of Certiorari, has continued in its practice of engaging in the most virulent obfuscation of the factual situation in making allegations as if true, while the record bears clear and cogent evidence of denial of due process. They do not address themselves to petitioner's cases or argument.

Respondent's allegation in its brief that a "plenary trial" on the issue of dischargeability was held insinuates that a *full* trial was held. The statement ignores the facts that only the plaintiff proceeded and that the defendant moved for a dismissal at the close of plaintiff's case. The record shows that defendant had over 20 group exhibits (the foundation for which was stipulated)[1] which he intended to introduce and which would have established the true relationship between Northern Trust Company and Ben Garman. Had his motion been denied, the defendant would have also had the opportunity to call as witnesses the "claimants" listed in his bankruptcy schedules to corroborate his testimony.[2]

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[1] App. Trans. pages 1 through 5.

[2] Garman testified that these claims were only listed at the insistence of his attorneys and did not represent any indebtedness. (See Appendix).

Respondent ignores the finding of the bankruptcy judge,[3] and avoids the finding of the district court judge affirming the bankruptcy judge's decision, (Appendix, page 11) wherein the district court judge correctly noted that the bankruptcy judge did not rule on the issue of whether a prima facie case had been made or whether Garman had the requisite "intent to deceive." Judge James' decision was made solely on the one element of whether reasonableness of reliance existed. There was no ruling upon the other elements of fraud necessary to bar the dischargeability of Ben Garman as required by 17(a)(2) of the Bankruptcy Act, (11 U.S.C. 35a(2)). Ben Garman, petitioner herein, did not have a chance to offer evidence in his own behalf. The "direct" examination referred to was as an adverse witness and limited solely to the questions raised by plaintiff's attorney. The 20 group exhibits referred to in Appendix 1 through 5 were never admitted into evidence. The witnesses to substantiate these documents and the general nature of the transactions were never allowed to testify because petitioner relied on Rule 41(b) in his right to put in a full and complete defense with all of his testimony and exhibits, had his motion been denied. The fact that his motion was successful should not bar him from so defending, if indeed the burden had shifted his case.

The "inherent incredibility," if any, is the testimony of Mr. Bishop, witness for the Northern Trust, and its other witness in over 12 years of lending and making loans to Ben Garman, the petitioner. Its primary reliance in making the last loan in November of 1973 was a written statement demanded 5 months *after* the loan was actually made, and only for the bank's benefit, at the bank's request, be-

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[3] App. pp. 9 and 10.

cause they were required to keep loans that were six months past maturity up to date or renewed.[4]

The testimony of Northern Trust's officers was that no financial statement (except one in 1970) was ever demanded or taken prior to or contemporaneaus with any loan. An alleged oral statement was made that Garman's financial condition was materially unchanged, but no reference *ever* was made regarding prior written statements. Section 17(a)(2), *11 U.S.C. 35(a)(2)*, demands that a false financial statement be in writing and any republication thereof be in writing, and that they must be made at the inception of the loan.[5]

B.

The respondent supplements its version of the facts with rhetoric about how Rule 52(a) of the Federal Rules of Civil Procedure and 28 U.S.C. §2106 justifies the decision of the court of appeals. However, crucial to the interpretation of these sections and disregarded by the respondent in its very own quotation (5 J. Moore, Federal Practice §41.13(2) at 41-185 (2nd Ed. 1980), respondent's brief, p. 14) is the requirement of the existence of undisputed facts or the presentation of *all* of defendant's evidence at trial prior to a proper appellate court reversal without remand. The paper shield respondent hides behind is insufficient to stymie petitioner's due process arguments and Rule 41(b) violations present in this cause. Respondent's own cited cases do not support its premise that an appellate court can become the fact-finder where disputed facts exist, and where the defendant has not had the opportunity to present his case in chief.

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[4] App. Trans. 88, 89, 90.

[5] 1A Collier on Bankruptcy, Sec. 17.16, pp. 1638.

Smith v. *Dravo Corp.*, 208 F.2d 388 (7th Cir. 1953, cited by the respondent, states that where the record is complete or the evidence uncontradicted or entirely documentary, the Appellate Court may decide the case. The court specifically restricted the use of its role as a fact finder in cases which did not involve witnesses' credibility, (at 392):

> "In McComb v. Utica Knitting Co., 2 Cir. 164 F.2d 670, at page 674, the court, after observing that the trial judge did not discuss a certain question or make any findings on it, citing a number of cases, said: 'As that evidence is entirely documentary, *no issue of witness' credibility arises;* therefore, we can pass on the facts as well as could the trial judge, and need not remand for a finding by him.' (emphasis added.)
>
> "In view of these authorities *and of the nature of the proof and its complete character,* we have entered our conclusions as to plaintiffs devices ABCD,E and F-G, as to the capital loss investment and as to interest, thus eliminating the necessity of any further hearing as to them." (emphasis added.)

In *Magna Sales Co.* v. *Magna Alloys Research Pty,* 545 F.2d 668 (9th Cir. 1977), cited by the respondent, the Court of Appeals cautioned against an appellate court making its own findings and stated the proposition that the failure of a trial court to issue separate findings "does not demand reversal" (at 671).

Yunker v. *CIR,* 256 F.2d 130 (6th Cir. 1958) and *Kostelac* v. *United States,* 247 F.2d 723 (9th Cir. 1957) also cited by respondent, were both cases in which there were undisputed facts consisting of documentary evidence. In the latter cause the appellate court made this perfectly clear:

> "Since the court has made no findings and since the evidence on this question is written, as it was before the trial court, it is proper for this court from such undisputed written evidence to decide whether Kostelac was entitled to rescind the contract . . . ." (at 726).

Another equally interesting Ninth Circuit case which the respondent failed to cite is *Engstrom* v. *Wiley,* 191 F.2d 684 (9th Cir. 1951). There the appellate court hesitated to determine its own findings of fact even where the facts were stipulated (at 686):

> "At the outset, it is urged that, since the facts are stipulated, this court must necessarily arrive at a result by consideration of the facts de novo. No such authority is vested in this court. The trial judge has found the facts. The function of this court is to determine whether his findings are unsupported by substantial evidence and therefore clearly erroneous."

Are we faced with a situation falling within the guidelines of the quotation of the respondent? (Respondent's brief, p. 14). The evidence is certainly not entirely documentary when the question of intent to deceive and fraud is involved. All of the evidence in the record is certainly not complete when neither the defendant's exhibits have been introduced nor has he had an opportunity to present them in his defense. The evidence is certainly not uncontradicted, entirely documentary, or complete, when the defendant has been unable to introduce witnesses relating to the particular debts alleged. Furthermore, the credibility of a witness is directly at issue.

As this court expressed in *Mayor of the City of Philadelphia* v. *Educational Equality League,* 415 U.S. 605 (1974), credibility of witnesses is difficult to determine from a transcript and better reserved with the trial judge (at 622):

> "We share the view expressed in the dissent [415 US at 645] that facts in a case like the instant one, 'when seen through the eyes of judges familiar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them' . . . ."

In *In re Rockford Baseball Club,* 201 F.2d 685 (7th Cir. 1953), the appellate court recognized the import of refraining from judging the credibility of witnesses where the trial judge made no specific findings pursuant to Rule 52(a) (at 687):

> "The record, therefore, reveals a situation aptly suited to the referee's function, that is, of passing on the credibility of witnesses and the reliability of their testimony, and of then selecting that evidence which to him seemed most reliable as a basis for findings of fact. Since we are not apprised of his subsidiary findings, 'we are far asea as to the exact factual basis upon which the judgment was founded.' Maher v. Hendrickson, 7 Cir., 188 F.2d 700, 702.
>
> "As the Supreme Court stated in Kelly v. Everglades Drainage District, 319 U.S. 415, at pages 421-422, 63 S.Ct. 1141, at pages 1145, 87 L.Ed. 1485:
>
> > It may be that adequate evidence * * * is in the present record. On that we do not pass, for it is not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make. * * * the nature of the evidentiary findings sufficient and appropriate to support the court's decision * * * is for the trial court to determine in the first instance in the light of the circumstances of the particular case. We hold only that there must be findings * * * which are sufficient to indicate the factual basis for the ultimate conclusion.' "

Nor has respondent demonstrated that this is one of those cases where its resolution is beyond any doubt or where "injustice might otherwise result." In the very case cited by respondent in this regard, *Singleton* v. *Wulff,* 428 US 106 (1976), this Court found those requisites absent and reversed the action of the court of appeals with language quite relevant to the instant cause (at 120):

> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed

> upon below. In *Hormel* v. *Helvering,* 312 U.S. 552, 556 (1941), the court explained that this is 'essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.' We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence."

The other two cases cited by respondent in support of its contention that this cause should not be remanded, *Haynes* v. *United States,* 390 U.S. 85 (1968), and *Kosty* v. *Lewis,* 319 F.2d 744 (D.C. Cir. 1963) are clearly distinguishable from the instant matter. The former case involved a claim of privilege against self-incrimination which was held to be a complete defense to the charges against the defendant resulting in an "inevitable" reversal of his conviction. In the latter case the defendant "expressly admitted" that it had no evidence to rebut the plaintiff's claims. Contrarily, in the instant matter, the petitioner contends it has proof to offer in his defense and the result is by no means "inevitable."

CONCLUSION

The cases cited in the various briefs clearly indicate that Ben Garman, the petitioner herein, has been denied an opportunity to present his defense. He has not been allowed to introduce documentary evidence, testify on his own behalf, or call witnesses to rebut an allegation of fraud which had not been proved in all of its elements. The record, replete with conflicting testimony, can only be balanced by an opportunity to allow a proper defense. Reliance on Rule 41(b) of the Rules of Federal Procedure cannot be cast aside simply for the sake of expediency coupled with

innuendoes of guilt; this is precisely what our rights of due process insure against.

For the foregoing reasons, Ben Garman, the petitioner herein, respectfully requests that the Petition for Certiorari be granted.

DANNEN, CRANE, HEYMAN & HAAS
By: Eugene Crane
Mitchell A. Cohen
Attorneys for Petitioner

APPENDIX

APPENDIX

Judge James' minute order

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable Thomas James

Cause No. 75 B 1111 Date March 29, 1977
Title of Cause Ben F. Garman

Northern Trust Company, plaintiff

vs.

Ben F. Garman, defendant

This case come on for trial on the complaint of the Northern Trust Company, plaintiff, to determine the dischargeability of an alleged debt owed it by Ben F. Garman, defendant. After the plaintiff had completed the presentation of its evidence, the defendant moved for dismissal of the complaint on the ground that upon the facts and the law the plaintiff had shown no right to relief (Bankruptcy Rule 741). For the reasons stated in open court on March 29, 1977, this court granted defendant's motion to dismiss. Judgment is therefore entered in favor of Ben F. Garman, defendant-bankrupt, and against Northern Trust Company, plaintiff, and the complaint and cause of action stated in it are dismissed.

cc Mr. Eugene Crane
Mr. Daniel Webb

Portion of Transcript of Proceedings in Bankruptcy Court on March 29, 1977

reliance on a particular document where nothing else can be seen from the fact that a balance existed, that there was a course of conduct. There had to be. The balance was from some loan, prior loan, that had been made for whatever reason it had been made and credit had been granted at that time.

So, the reliance is not on that one statement or a supposed republication in the statement because of the wording that said something to the effect that anybody signing that statement would advise the bank if a condition changes which I consider as a practical matter to be almost ludicrous, and in subsequently making loans and taking additional statements after the loan, in choosing the one on which to rely because it is contemporaneous as the only contemporaneous statement indicates that there cannot have been any reliance on these statements at all.

I submit that the elements of moral turpitude and fraud in the denial of a discharge have not been met.

The Court: Thank you.

In all of these cases under Section 17(a) the Court requires clear and convincing evidence at some point. I do not think at this point when the motion is made that the Court should go ahead with a trial if it believes that the evidence is not clear and convincing so at the end of the defendant's case it could render a judgment in favor of the plaintiff.

Therefore, I shall grant the motion to dismiss at this time.

The plaintiff has not proven by clear and convincing evidence that it would be entitled on the facts and the law to a judgment in its favor.

I note that Section 17(a) provides in pertinent part, that is sub-section two, a discharge in bankruptcy shall release a bankrupt from all of his proven debt except such as are for obtaining money or property on credit, or obtaining an extension or renewal of credit in reliance on a materially false statement in writing respecting his financial condition, made or published, or caused to be made or published in any matter whatsoever with intent to deceive.

I appreciate Mr. Webb's comments about Mr. Garman's testimony though I think that your comments, Mr. Webb, do not necessarily state that or show that Mr. Garman did have the intent. However, I do not make my judgment on whether there was intent to deceive in this case. I looked more to the conduct of

Portion of Transcript of Proceedings in Bankruptcy Court on March 28, 1977

relied upon in making certain loans of money to Mr. Garman.

The loans totaled $30,000 during the years 1970, 1971, 1972, and 1973. As of November 1, 1973, the loans totaled $30,000. At that time Mr. Garman signed a renewal note for the $30,000.

The bank relied upon the most recent financial statement on file with it at that time. In January, 1975, the defendant Ben F. Garman, filed a petition in bankruptcy with this Court, and in that petition listed on Schedule A-3 marked "unsecured debts", listed approximately $50,000 in debts which he stated on the bankruptcy petition had been in existence at the time he filed the written financial statements with the bank, but which debts were not included upon the written financial statements filed with the bank during the years '70 through '73.

I anticipate in proving that the bank had in its possession these false financial statements, relied upon them to their detriment, loaned the $30,000 to Mr. Garman, and now Mr. Garman has filed the petition in bankruptcy to have this debt discharged.

It is the plaintiff's contention that under the appropriate statute referred to in our complaint that because this debt was based upon a false written

As its Group Exhibit No. 1, all of these documents are copies of documents in the bank's loan or credit file which I got from the plaintiff pursuant to motion to produce, the Defendant's Group Exhibit No. 1 which consists of an interoffice memorandum dated January 12, 1962; a loan memorandum dated January 12, 1962; a letter from the Northern Trust, dated January 15, 1962, to Mr. Hugh Fanning; and an undated memo signed GSS which Mr. Webb would agree appears to be part of that same dated transaction.

Mr. Webb: That is correct.

Mr. Crane: As Defendant's Exhibit No. 2, an interoffice memorandum from the Northern Trust, dated November 27, 1963.

As Defendant's Exhibit No. 3, an interoffice memorandum dated January 21, 1964.

As Defendant's Exhibit No. 4, consisting of two documents, I'm sorry, one document with two notations, a note from Ben Garman, the bankrupt, dated 7/3/64; and a hand-written response, dated 7/8/63, I think there is an error in the date, to that by the bank.

Is that correct, Mr. Webb?

Mr. Webb: Yes, that is correct.

Mr. Crane: As Defendant's Exhibit No. 5, an interoffice memorandum, dated June 15, 1967, and a loan memorandum dated, June 14, 1967.

As Defendant's Exhibit No. 6, a personal financial statement, dated January 5, 1962.

The Court: These all go in chronological order?

Mr. Crane: No, I'm sorry, your Honor, they go back at the moment.

The Court: Is that January 5, 1962?

Mr. Crane: Yes, sir.

As No. 7, a financial statement, dated October 22, 1964.

As No. 8, a financial statement, dated May 18, 1966.

No. 9, a financial statement, dated June 22, 1967.

No. 10, a financial statement, dated December 9, 1968.

Defendant's Group Exhibit No. 11, which consists of 5 documents, an interoffice memorandum, dated December 9, 1970, which bears on it a notation on it dated, September 3, 1971, it is apparently two documents in one; a loan memorandum, dated December 9, 1970; a personal financial statement, dated December 8, 1970; and a credit advice, dated December 9, 1970.

As Defendant's Exhibit No. 12, a loan memorandum dated June 17, 1971.

Defendant's Exhibit No. 13, consisting of 3 documents, a loan memorandum, dated December 21, 1971; a credit advice, dated December 21, 1971; and a personal financial statement, dated December 22, 1971.

Defendant's Exhibit No. 14, a loan memorandum, dated September 5, 1972 and a credit advice dated September 5, 1972.

As Defendant's Exhibit No. 15, a credit advice, dated January 15, 1973, and a demand note, dated January 15, 1973.

As Defendant's Exhibit No. 16, a financial statement, dated February 27, 1973. That has already been submitted as Plaintiff's Exhibit No. 2.

As Defendant's Exhibit No. 17, a loan memorandum dated March 2, 1973, and a credit advice, dated March 2, 1973.

As Defendant's Exhibit No. 18, a promissory—discount note, dated June 1, 1973.

As Defendant's Exhibit No. 19, a promissory note dated November 1, 1973, which I believe is Plaintiff's Exhibit—

Mr. Webb: That is correct. Plaintiff's Exhibit No. 9.

The Court: Is that it, Mr. Crane?

Mr. Crane: I think I have a few more.

The Court: 20 is the next number.

Mr. Crane: 20 is a Group Exhibit consisting of a letter dated May 15, 1974, to the bankrupt from Carol King; a letter to Mr. Bishop of the Northern Trust, dated June 21, 1974, from James Carmel; and a memorandum or letter from the bankrupt, Ben F. Garman, to Northern Trust Company, dated January 15, 1975.

These are all from the loan file, and those are all of the documents.

The Court: As I understand, Mr. Webb, you stipulate as to the foundation for these documents? Admit and received in evidence, thank you.

Mr. Webb: Yes—no. We stipulate as to foundation.

Mr. Crane and I both agree that some documents we feel are not relevant.

The Court: Just the foundation.

Mr. Webb: Foundation, thank you, your Honor.

The Court: There may be objection as to relevance and that is reserved by both parties as to the other's documents.

Mr. Crane: Your Honor, I see that a young lady has entered. If that is plaintiff's second witness, I would • • •

Q. It wouldn't be after?

A. No, sir.

Q. What I am getting to is did you have the personal financial statement dated December 22, 1971 at the time you made the loan to Mr. Garman?

A. No, your Honor.

Q. Thank you.

By Mr. Webb:

Q. Now, directing your attention to—

The Court: I think I interrupted his answer.

By Mr. Webb:

Q. Were you in the middle of explaining what you did in this particular case as to that particular $4,000 loan?

A. Yes, I was.

Q. Would you please continue.

A. I left off at the point of indicating that I had examined the December 8, 1970 statement previously presented to me and that I had asked Mr. Garman if there had been any material change in his financial condition since that date.

I would have asked this question on or a few days prior to December 21, 1971. I approved this loan based on the 12/8/1970 financial statement, and Mr. Garman's * * * loan that is reflected on the exhibit marked Plaintiff's Exhibit No. 5?

Mr. Crane: Your Honor, I will object to that.

That calls for a conclusion of the witness as to what he did with the documents 2, 4, and 7. Maybe he did nothing with them.

The Court: That's right, and he can so state.

That is a proper question and the objection is overruled.

By The Witness:

A. In connection with the loan that I made to Mr. Garman in the amount of $10,000 on September 5, 1972, I examined the most recent financial statement which I had in my possession which was dated December 22, 1971.

Based upon this financial statement, together with Mr. Garman's statement, oral statement to me, that there had been no change in his financial condition at the time of this loan, September 5, 1972 back to December 22, '71, I granted this additional loan.

By Mr. Webb:

Q. Now, directing your attention to the exhibit marked as Plaintiff's Exhibit No. 6 which was previously identified as a note for $15,000, dated January 15, 1973, do you have that in your hand and are you looking at that at this time, Mr. Bishop?

A. Yes, I am.

Q. I want you to examine Plaintiff's Exhibit Nos. 2, 4, and 7, the financial statements and tell the Court what if anything you did with those statements in connection with the loan evidenced by Plaintiff's Exhibit No. 6?

A. In the case of the $15,000 loan, dated January 15, 1973, to Mr. Garman, I referred to the December 22, 1971 financial condition; re-examined it; asked Mr. Garman again if there had been any material change in his financial condition since December 22, 1971, and the time I made this loan on January 15, 1973.

He indicated there had not been any material change. Upon—I made my loan decision based on that and asked him to resubmit a more current personal financial statement which he subsequently did about a month later, dated February 27, 1973. That's the financial statement.

Q. Now, Mr. Bishop, you might lay those exhibits aside, but would you please keep the financial statements in your hand.

Prior to testifying here today, have you seen the bankruptcy petition filed in this case designated * * *

Q. Is that a payment?

A. Yes, sir.

Q. Did you receive any other documents from Mr. Garman on September 3, 1971, at the time of the extension of that loan?

A. Well.

Q. To your knowledge?

A. Not to my knowledge.

Q. Did you ask Mr. Garman for an additional personal financial statement form on September 3, 1971?

A. No, sir, not to my knowledge.

Q. Mr. Bishop, I now show you what is marked as Defendant's Exhibit No. 12, purporting to be a loan memorandum dated June 17, 1971, and ask you if that bears a facsimile of your signature and whether you prepared that memorandum?

A. Yes, sir. This is a copy of my signature; and the entire document, where it is handwritten, is my handwriting.

Q. And, would you tell the Court what loan that memorandum refers to?

Did that extend an original loan for another period of time?

A. Yes, sir. I have under purpose of loans, see * * *

Q. But the total indebtedness if I understand you was $6,000?

A. Yes, it was.

Q. And, at the time this $6,000 loan was made on December 21, 1971, and I show you Exhibit B of Defendant's Group Exhibit No. 13 For Identification purporting to be a credit advice, and ask you what that specific credit advice relates?

A. This relates that we credited what appears to be Mr. Garman's checking account 418137 at the Northern Trust Company.

Q. And, on what date was that account credited?

A. December 21, 1971.

Q. And, on December 21, 1971, did you take an additional personal financial statement from Mr. Garman during that date?

A. I requested an additional financial statement.

Q. Did you take one was the question that I asked you, on that date?

Did Mr. Garman present you on December 21, 1971, with an additional personal financial statement?

A. No, sir.

Q. Did he present you with an additional personal financial statement within the week prior to * * *

The Court: Have you given that an exhibit number, I don't recall?

Mr. Crane: No, I didn't.

By The Witness:

A. I do not recall whether I have seen that particular personal financial statement before or not.

Mr. Crane: That was Defendant's Exhibit No. 7, your Honor.

The Court: It has already been marked then.

By Mr. Crane:

Q. Mr. Bishop, you testified that when Mr. Garman made the loan of December 9, 1970, you reviewed his personal financial statement at that time?

A. Yes, sir.

Q. I believe you identified that personal financial statement as Plaintiff's Exhibit No. 2. Did you go over the items on this personal financial statement with Mr. Garman personally?

A. I don't think so.

Q. I show you what has been marked, this is a copy of a document marked Plaintiff's Exhibit No. 2, and ask you if you see under the section "Annual Income" "Other Income Counseling Fees?"

A. Yes, sir. I do.

By Mr. Crane:

Q. Mr. Bishop, I believe you testified that Mr. Garman did not list on his financial statements which you submitted as your exhibits the Exchange National Bank as a creditor, is that correct?

A. Yes, to the best of my knowledge.

Q. Do you know whether Mr. Garman had ever listed the Exchange National Bank on prior financial statements?

A. I do not know.

Q. Do you know whether the bank was aware of his relations with the Exchange National Bank prior to that time?

A. I was not when I was lending him money.

Q. If I were to tell you that the loan file contains memorandums referring to a loan at Exchange National Bank, would that be accurate.

You wouldn't know. I withdraw that question.

I show you a document labeled Defendant's Group Exhibit No. 1 A, dated January 12, 1962, which is part of the loan file, and ask you to read for the Court just that sentence right after "Re Ben Garman".

Mr. Webb: Your Honor, I am going to object on the grounds of relevancy.

any loan made or additional monies requested?

A. No. It was an attempt to get some of it back.

Q. And, you contacted him, in other words, for collection purposes on old loans?

A. I don't remember the specific dates. I think I have had conversations with Mr. Garman subsequent to my direct lending to him with regard to outstanding loans.

Q. The additional loans that were made in March of '73, and the notes signed in June of '73, and November of '73, if I understand correctly, would have been either approved by some other officer or directly handled by someone else.

Somebody else would have been in contact with Mr. Garman?

A. That is correct.

Q. You weren't personally involved in the signing of the documents or a discussion of the extensions, or the renewal notes, with Mr. Garman?

A. Would you rephrase that question?

Q. Were you personally involved—were you present when Mr. Garman executed any of these notes?

A. Not to my knowledge, but I could have been.

I know Mr. Garman and if—

The Court: There is no question pending, sir.

home by June 1, 1973, I have agreed to renew the loan to 9/15/73."

Then, it just says "credit account, checking account."

Q. Do you recall that being your instructions?

A. No, sir.

Q. And, there was no additional personal financial statement requested or received of Mr. Garman on March 2, 1973, is that correct?

A. I have no idea.

Q. You have—there is none introduced by you, nor do we know. To your knowledge, do you know whether you asked him or he was asked about it?

A. I have no idea.

By The Court:

Q. Were you in charge of Mr. Garman's account on that date?

A. No, sir.

Q. When had you left?

A. Around January 12th, the 15th, about the middle of January.

Q. of '73?

A. Yes, sir.

Q. Thank you.

December 21, 1971?

A. No, sir.

Q. Now, I believe you testified, Mr. Bishop, that in January of 1973, Mr. Garman was given the proceeds of an additional loan for $15,000, is that correct?

A. Yes, sir.

Q. And, in January, 1973, were you the officer who approved that loan, if you recall?

A. Yes, I believe I was.

Q. And, in January 15, 1973, did you ask for or receive from Mr. Garman an additional personal financial statement?

A. I asked for an additional personal financial statement.

Q. Did you receive one at that time?

A. No, sir.

Q. Prior to this loan?

A. No, sir.

Q. And at the time the proceeds of the loan were credited to Mr. Garman's account, January 15, 1973, did you have an additional personal financial statement from Mr. Garman?

A. No, I had one dated December 22nd.

Q. No, I asked you if you had one dated that date?

The Court: Not necessarily, if the proper foundation is made during the examination at the time, if it comes to pass, that the defendant goes ahead.

Then he could ask that they be admitted without Mr. Bishop being here.

Mr. Webb: I have allowed this witness to testify from the contents of these documents when they really aren't in evidence and I want to state for the record, I tend not to object so that it will make things speedier; I would ask the Court then to withhold ruling until Mr. Crane's chance to present his evidence when he can offer the exhibits and if they are relevant, it will not be necessary to call this witness back again.

The Court: All right.

So at this time, the Court will not rule on the admissibility of Defendant's Group Exhibit No. 11 or Defendant's Exhibit No. 12.

By Mr. Crane:

Q. Mr. Bishop, I call your attention to the loan made by Mr. Garman on December 21, 1971, about which you have testified.

Do you recall how much cash Mr. Garman was given at that time?

A. Would you repeat the date of that loan?

By The Court:

Q. As to this statement that was made on December 8, 1970, you said you looked back to the file for a couple of years, did you verify Mr. Garman's employment at that time?

A. No, sir, because I was familiar with the company and his superior in Chicago. I knew he was employed by that firm so I did not have to verify it.

Q. Did you verify how many dependents Mr. Garman had at that time?

A. No, sir. That was essentially irrelevant based on his income level and financial condition in terms of our loan.

Q. His net worth is the basis on which you make all of these decisions?

A. That coupled with the income, current indebtedness, in other words, his cash flow, his ability to repay the loan.

Q. All right. I am interested, and you will have to bear with me while I formulate some of these.

The cash flow shows $37,000. Is that gross income or net income?

A. That was the gross, I believe, yes, sir.

Q. You have to take out taxes from that?

A. Yes, living expenses and mortgage and so forth.

Q. Don't you come to some judgment, or some figure that you look to as to the monies that are available to repay any indebtedness?

A. Yes, sir.

Q. Did you, as to the December 8, 1970, statement?

A. Yes, sir.

Q. What was that figure?

I have a copy of here, that has been identified as Exhibit No. 2, you have $37,000 as total income?

A. Yes, sir.

Q. His net worth—I suppose what I am getting into, Mr. Bishop, the net worth here all seems to be tied up in a particular house?

A. Yes, sir, 39 from 75, the bulk of it.

Q. That is not very liquid?

A. No, sir, but with a $37,000 income, there should be sufficient monies to repay the loans.

Q. How much money do you think from that he had to repay the loans in 1970?

Why didn't you get a statement as to his monthly mortgage payment. It is not there, it it?

A. No, sir.

Q. What the school costs; do his children have school expenses?

A. That is an excellent idea.

Q. This is what I look to. I don't consider that necessarily a financial statement because it doesn't show the monthly income and expenses.

It may be a financial statement in the sense that it may be assets and liabilities, but somehow these are misleading, even if we assume that they were stated accurately as to what a cash position of a person is and what types of loans he can handle.

A. Of course, when we talk with a borrower, we set up a repayment schedule that meets his abilities that indicates quite a bit in terms of funds—

Q. These weren't monthly payments?

A. No, sir.

Q. It doesn't show that he has any cash on hand. He had an overdrawn checking account. So, where do you think the cash is going to come from to pay these loans?

A. His monthly or bimonthly payments from the company he works for.

Q. How do you know for any monthly or bimonthly payment that there would be funds available to pay the loan?

A. From the statement?

Q. Yes.

A. You can't tell from the statement.

Q. That's right.

The Court: Did you wish to ask Mr. Bishop any questions?

This bothers me on these types of statements.

Mr. Crane: Your Honor, may I recall Mr. Bishop later and ask just a few more questions?

You have asked him about the company that Mr. Garman is employed by which I think requires, for the benefit of the Court, an explanation from Mr. Bishop.

The Court: Why? I was just wondering if he verified this from the file or some other place, that is all.

It does bother me, Mr. Webb, and—Do we have any more quesions of Mr. Bishop?

Mr. Crane: I do.

The Court: Of what basis?

Mr. Crane: I would like Mr. Bishop to tell the Court what company Mr. Garman does work for.

The Court: New York Life. It says on the financial statement.

Mr. Crane: And whether New York Life is a major depositor in an account with the Northern Trust Company?

The Court: It may very well be.

statement one in the file that you reviewed before making or approving the November loan?

A. Yes.

Q. Or the renewal I should say?

A. Yes.

Q. To your knowledge, Ms. King, to this date, what is the amount of money due and owing by Mr. Garman as a result of loans he had from your bank?

A. $30,000.

Mr. Webb: I have no further questions, your Honor.

The Court: Do you have any questions, Mr. Crane?

Mr. Crane: Just a few, your Honor.

Cross-Examination by Mr. Crane.

Q. Now, Ms. King, on November 1, 1973, the date of that renewal note, did Mr. Garman receive any new cash?

A. No.

Q. Was this note signed at Mr. Garman's request or at your request?

A. Was the note signed at Mr. Garman's request or my request?

He would have to sign the note in order to renew the loan.

Q. Did you ask Mr. Garman to come in and renew the note because it was past due?

A. I don't remember.

Q. But, Mr. Garman didn't come in and ask to sign the new note for the same amount of money?

A. I don't remember.

Q. Would you, as a bank officer, have a note renewed that was unpaid for a period of six months?

A. Depending upon the circumstances of the loan, yes.

Q. Would it be to the bank's benefit to have this note renewed, November 1, 1973?

A. To the bank's benefit? Yes.

Q. Would that be required by the bank to have these notes renewed or brought up to date?

A. Yes.

Q. Would it be normal to request the borrower to come in and sign such a note if it hadn't been paid?

A. In most instances we just send the renewal note out for signing.

Q. As far as you know, this note wasn't signed at the request of Mr. Garman, was it?

A. No.

Q. Can I assume it was signed at the request of the bank?

A. Yes.

Q. Did you ever talk to Mr. Garman and ask him what his financial condition was in November, 1973?

A. I don't remember.

Q. Did you ever discuss Mr. Garman's financial condition with him at anytime?

A. Yes.

Q. When was that?

A. In May when I wrote him a letter and asked him for a financial statement.

By The Court:

Q. May of what year, please?

A. 1974. I didn't get a response and I telephoned him.

Q. That is after the due date of this note?

A. Yes.

By Mr. Crane:

Q. And, you never received the statement, is that correct?

A. I did not.

Mr. Crane: I have no further questions of this witness.

The Court: Do you have any further questions of this witness, Mr. Webb?

Mr. Crane: Will the Court permit a narrative answer from Mr. Garman?

Mr. Webb: I have no objection.

The Court: Mr. Webb controls the answers.

By Mr. Crane:

Q. Would you please explain what the nature of your relationship to Hal Solomon was and where that figure of $10,800 came from?

A. All right, fine.

That figure, first of all, these lists that Mr. Webb continually this afternoon referred to as my debts were in fact never debts with one exception, the case of the estate of Kenneth Stoen, where—

Q. What were they?

A. I signed the promissory note.

The reason it was not reflected on the bank's statement is because that was offset by stock which I own for Kenneth Stoen. So one offset the other and had nothing to do with the bank statement.

As to these others, I was instructed at the time when I was filing for bankruptcy and I had consulted with you and your firm, to list any possible indebtedness.

At that time, I actually didn't have these even in my mind. Then, after interrogating me further and we talked and talked for quite some length and you made a point of the fact that could there be possibly somebody who would claim, or make a claim against you because you made it clear that once I filed bankruptcy that I could never go back and say, "Hey, I forgot this."

So, on that recall, and with that in mind, I listed the potential and because it did say claim, that there were certain agreements that I had with these people that are listed here, informal agreements.

They were not legal documents; they were just informal agreements. However, they could be construed to be a claim.

In view of the fact that they could possibly become a claim in the future, I agreed to their listing on this form of bankruptcy.

I would like to reiterate without sounding disrespectful in any way, this was not intended to by-pass the question, but I wanted to make it clear that I did not hide anything.

I did not feel that the word "debt" did justice to what was involved here as the listing of a claim.

Incidentally, this form here says something where I signed it "to your information," and that was what I was referring to based on the information here that their statement of all my debts and all my property in acccordance to the best of my knowledge, information and belief, information being the information that you provided—

Q. Mr. Garman, may I interrupt you?

A. Yes.

Q. In Schedule A-3 you show the name Hal Solomon, MD?

A. Yes, sir.

Q. The amount of the claim approximately $10,800?

A. Yes, sir.

Q. Do you owe or do you think you owe Hal Solomon any money?

A. No.

Q. Did you think you owed Hal Solomon any money on the date that you prepared your bankruptcy schedule?

A. No, sir.

Q. What was your relationship with Hal Solomon?

A. Very close friend.

Q. Did he ever make a demand upon you for any money?

A. Never.

Q. Did he ever lend you any money?

A. No.

Q. What did the $10,800 figure represent?

A. It represented money that he had invested over a period of time with my counseling, that's where the counseling fees were listed on my statement with the bank.

I divulged that information to the bank that I was earning counselling fees advising some of these close friends on certain stock purchases.

It would be inconceivable that Dr. Solomon would make a claim against me, but it would be conceivable that it was

my advice that I gave him that maybe someone in his estate could possibly have filed a claim against me.

Q. Did Dr. Solomon purchase stock based on your recommendation?

A. Yes, he did.

Q. Were you to share in the profits of the sale of that stock?

A. Yes.

Q. And what if that stock did not make a profit but bore a loss?

A. We wiped out the losses before—

Q. Who is "we". When you made the arrangement with Dr. Solomon who was to bear that loss?

A. He would bear the loss and I would share, after losses were deducted, any gains would be shared.

Q. If the entire stock you recommended became worthless, would you be obligated to pay Dr. Solomon any money?

A. No, sir.

Q. Is this the same arrangement you had with Randolph Engler?

A. That is essentially the same arrangement, yes.

Q. Has Randolph Engler ever made any demand upon you?

A. No, sir.

Q. Is there any document in writing between yourself and Randolph Engler?

A. No, sir.

Q. Is that the same arrangement you had with Norman Isaacson?

A. Yes, sir.

Q. Has Norman Isaacson ever made a demand for payment?

A. No, sir.

Q. Are there any documents in writing between you and Norman Isaacson?

A. No, sir.

Q. Do you believe you owe Norman Isaacson any money?

A. Nothing.

Q. Did you at the time you filed and signed these financial statements to the Northern Trust?

A. No, sir.

Q. Did you at the time you prepared your bankruptcy schedule?

A. No, sir.

Q. Why did you list them in your bankruptcy schedule?

A. As I explained to you previously, sir, I was going by the claim, the word "claim" as a possible—

Q. Is it because I insisted you list them?

A. Yes, I didn't want to say that, but that's what it was.

I was trying to give myself credit for the claim part of it. I happen to be a student of semantics.

Q. Did you at any time ever consider these obligations of Hal Solomon, Norman Isaacson, and Randolph Engler or Kenneth Stoen debts of yours?

A. I made one exception to—

Q. Kenneth Stoen?

A. Mr. Stoen, that is correct.

Q. Did you consider these investments?

A. I considered this counseling, what my statement to the bank showed.

Q. When you refer to your statement to the bank, on all three financial statements referred to by Mr. Webb under the section "Annual Income," you have written in counseling fees?

A. That is correct.

Q. Are these the monies to be earned from the transactions with Mr. Solomon, Mr. Isaacson, and Mr. Engler?

A. That is correct.

Q. Did they ever ask you about the counseling fees?

A. Who?

Q. Did anybody at the bank ever ask you what counseling fees meant?

A. No, sir.

Q. Mr. Garman, were these financial statements true and correct? Did they truly reflect your assets and liabilities as of the date you prepared them?

A. I believe so.

Q. And, did your bankruptcy schedules truly reflect your assets and liabilities as of the date you prepared them?

A. Based on what you insisted on my putting down, I guess I would have to say yes, sir.

Q. Were you told you must put down every possible debt?

A. I don't know the words. You used more than possible, inconceivable, under the most unusual of all possibilities.

Mr. Crane: I have no further questions.

The Court: Do you have any other questions?

Mr. Webb: I have a couple of other questions.

I don't want to keep your Honor.

The Court: You keep going, I will watch the clock.

Examination

By Mr. Webb:

Q. Mr. Garman, in the deposition that I took of you, you referred to these matters as potential liabilities do you recall that?

A. That is correct.

Q. Now, you are referring to them as claims, is that correct?

A. If you have the words, I will have to say on one hand I referred to them as such and perhaps another—

The Court: Again, just listen to the questions.

The Witness: Yes, sir. He is asking me if I remember, and I don't remember.

The Court: If you don't remember say, "I don't